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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RAMIRO MEDINA DELGADO,

Defendant and Appellant.

F075628

(Super. Ct. No. 15CR-06488-RF)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Merced County. John D. Kirihara, Judge.

Melissa Baloian Sahatjian, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and F. Matt Chen, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Peña, Acting P.J., Snauffer, J. and DeSantos, J.

Appellant Ramiro Medina Delgado was charged in count 1 of a first amended information with criminal threats (Pen. Code, § 422, subd. (a))[1] and in count 2 with felony vandalism (§ 594, subd. (b)(1).) A jury, however, found Delgado guilty in count 1 of the lesser included offense of attempted criminal threat (§§ 664 & 422) and acquitted him of vandalism.

On May 5, 2017, the court granted Delgado probation on condition that he serve 90 days in local custody.

On appeal, Delgado contends the court: (1) committed instructional error; and (2) abused its discretion when it denied Delgado's request to reduce his attempted criminal threat conviction to a misdemeanor. We affirm.

FACTS

The evidence at trial established that in 2015, Joe Aguirre lived with his girlfriend, Patsy Placencia, in her house in Atwater. Patsy was the sister of Evelyn Placencia,[2] Delgado's girlfriend. Sometimes when Delgado and Evelyn would visit, they would drink and argue with Patsy.

Prior to December 2, 2015, Delgado had not come to the house uninvited. However, because of the problems when Delgado and the two sisters got together, Aguirre and Patsy agreed that if Delgado and Evelyn showed up unexpectedly, Aguirre would politely tell them they were not welcome there and that Patsy did not want to have anything to do with them anymore.

On December 2, 2015, at approximately 8:00 p.m., Aguirre heard a loud, hard knock at the front door. He went to the window, looked outside, and saw Delgado holding a screwdriver in his left hand, down by his side, with the shaft pointing outward.

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[1] All further statutory references are to the Penal Code.

[2] For purposes of clarity, Patsy Placencia and Evelyn Placencia will be referred to by their first names.

Aguirre thought Delgado might be there to create a conflict again. Aguirre spoke with Patsy, who was on a couch in the living room, and she told Aguirre to tell Delgado he was not welcome there. Aguirre opened the door about four inches and relayed the message. Delgado said he wanted to speak with Patsy. Aguirre replied that she did not want to speak with him and he closed the door gently.

Aguirre walked to the living room and Delgado pounded on the door "like a madman" for about 30 seconds to a minute[3] as if he wanted to break in and he angrily yelled, " 'Come out here. I'm going to kick your ass. I'm going to kill you.' " Aguirre initially thought Delgado wanted only to physically harm him. But when he recalled that Delgado was armed, he thought Delgado wanted to kill him and he began to fear for his life. He also decided he had to defend himself.

Aguirre and Patsy then started arguing because Aguirre said he was going to answer the door. As Aguirre tried to open the door, Patsy got between him and the door and stated, " 'You don't know what he's about. He's crazy. He's stupid. He might hurt you.' " Nevertheless, Aguirre managed to open the door "a crack." Delgado then stuck his foot in the opening and he continued to pound on the door and push it as Aguirre pushed back. Delgado also continued to tell Aguirre to go outside and that he was going to " 'kick [his] ass' " and " 'kill [him].' " This caused Aguirre to become more afraid because he was then only 10 to 12 inches away from Delgado. Each time Delgado said something to Aguirre, he thought Delgado would stab him with the screwdriver and he feared for his and Patsy's lives.

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3 A portion of the door was made of glass. The prosecution presented evidence that the glass portion had a crack that was described as being "not that big" and that the cost to replace the door was $1,008.72. However, the evidence was inconclusive whether the crack was a stress crack that resulted from a defect in the glass or whether it was caused by someone punching it.

When Aguirre told Patsy to call the police, the pressure on the door ceased and Delgado began running away. Aguirre then realized he had the phone he shared with Patsy and called 911. The whole incident from when Delgado initially knocked on the door until he quit pushing on it lasted about five minutes, including approximately one and one-half minutes during which Delgado had his foot in the door.

Later that night, when he spoke with a police officer, Aguirre was still in fear of Delgado and he was shaking because he did not know if Delgado was going to arm himself with a gun or other weapon and return to retaliate. Aguirre asked the officer to call him once Delgado was in custody.

Delgado was arrested that night at 8:45 p.m. outside his residence. As he was being escorted to a patrol car, Delgado spontaneously stated, " 'I knew I was going to jail.' " Although a dispatcher called and told Aguirre that Delgado was in custody, Aguirre did not sleep well that night.

During closing arguments defense counsel argued that Aguirre lied about many things and the only issue in the case was whether the jury could believe beyond a reasonable doubt that Aguirre testified truthfully.

DISCUSSION

The Alleged Instructional Error

Delgado appears to contend that the court prejudicially erred because it did not instruct the jury that in order to find him guilty of attempted criminal threats, they had to find that the intended threat was sufficient under the circumstances to cause a reasonable person to be in sustained fear. (See *People v. Chandler* (2014) 60 Cal.4th 508, 525 (*Chandler*.) We agree the court erred by failing to so instruct the jury, but we find the error harmless.

> "In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to

> another person,' (2) that the defendant made the threat 'with the specific intent that the statement … is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, … so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)
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> "An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (§ 21a.) "[W]hen a defendant is charged with attempted criminal threat, the jury must be instructed that the offense requires not only that the defendant have an intent to threaten but also that the intended threat be sufficient under the circumstances to cause a reasonable person to be in sustained fear." (*Chandler*, *supra*, 60 Cal.4th at p. 525.) "[A] trial court's failure to instruct on an element of a crime is federal constitutional error that requires reversal of the conviction unless it can be shown beyond a reasonable doubt that the error did not contribute to the jury's verdict." (*People v. Cole* (2004) 33 Cal.4th 1158, 1208-1209.)

Delgado relies on *People v. Jackson* (2009) 178 Cal.App.4th 590 (*Jackson*) to contend that the court's instructional error prejudiced him. In *Jackson*, Rosemary Rogers and her husband, William, went to their rental house to get the key from the tenants, whom they were evicting, and found the defendant sleeping on the floor of a bedroom. Rosemary told the defendant he was trespassing and directed him to get his belongings and get out. At trial, Rosemary testified that after the defendant had most of his belongings outside, as she stood in the doorway to prevent him from re-entering the house, the defendant began getting anxious and agitated and said something about " 'blowing [their] heads off' and 'chopping [their] heads off' " and something about a rifle. While Rosemary and William remained in the front room, William called the police and the defendant was eventually arrested. (*Id*. at pp. 594-595.)

William testified that after Rosemary told the defendant to leave, the defendant became " 'very agitated [and] fidgety.' " After removing his belongings, he returned and said he was not leaving and he was " 'going to get an AK-47 and blow all your heads off,' " and he may also have said something about cutting their heads off. After William called the police, the defendant went outside and sat down. (*Jackson*, *supra*, 178 Cal.App.4th at pp. 594-595.) A jury found the defendant guilty on two counts of attempted criminal threat, a lesser included offense of the criminal threats charged in each count. (*Id*. at p. 595.)

The *Jackson* court found the court erred because it did not instruct the jury "that to be guilty of attempted criminal threat defendant's intended threat had to be one that reasonably could have caused the person to suffer sustained fear." (*Jackson*, *supra*, 178 Cal.App.4th at p. 599.) In concluding that the error was prejudicial, the *Jackson* court stated:

> "In finding defendant not guilty of the completed crime but guilty of attempt, the jury must have found that defendant made the 'blow-your-head-off' statements and that he intended them to be taken as threats but that one or both of the last two elements of the completed crime was missing, namely that William and Rosemary did not suffer sustained fear or that their fear was unreasonable under the circumstances. The instruction allowed the jury to find defendant guilty of attempted criminal threats under either of these factual scenarios. And the evidence would support either scenario. The jury might not have believed William and Rosemary when they stated they actually feared for their lives. Or, the jury might have concluded, since William and Rosemary were safely inside the house with a telephone to call the police while defendant sat out front, or since defendant's threats were so outlandish, that defendant's statements could not reasonably have caused the victims to suffer sustained fear. The latter scenario is legally insufficient to support conviction of an attempted criminal threat and the former scenario is sufficient only upon finding that a reasonable person could have suffered fear in those circumstances, something the jury was not asked to decide. Since there is nothing in the record upon which to find that the verdict was actually based on a valid ground, we must reverse." (*Jackson*, *supra*, 178 Cal.App.4th at p. 600.)

In *Chandler*, the defendant lived around the corner from Jamie Lopez. (*Chandler, supra*, 60 Cal.4th at p. 511.) In January 2009, the defendant drove by her on two occasions and called her a " 'bitch' " and on one of those occasions he told her he knew she lived alone. Around that time, Lopez saw the defendant walk down the middle of the street using profanity and laughing at her and she heard the sound of tennis balls being bounced off her windows and a pipe thrown at the front door. One day she also saw a large quantity of nails spread out in the street and on her driveway and an expletive spray painted on the street. (*Id*. at p. 511.)

On January 29, 2009, Lopez saw the defendant walking up the street holding " 'an object' " saying, " ' "F*** you, bitch. I'm going to kill you." ' " Lopez spent that night at the home of a neighbor, Deborah Alva, and during the night they heard the defendant sing a song with lyrics that included the words " 'somebody's watching me.' " The following day Lopez was in her car with her two children and Alva's son when the defendant approached and said words to the effect of " 'I'm going to kill you bitch.' " Lopez was frightened, drove away quickly, and called the police. (*Chandler, supra*, 60 Cal.4th at pp. 511-512.)

At trial, Alva testified that the defendant had also threatened her. On January 29, 2009, she heard a disturbance, walked outside her house, and saw the defendant walking up the street swinging a golf club back and forth. The defendant looked at Alva and said, " ' "I'm going to kill you, you f***ing bitch." ' " Alva yelled back, " ' "bring it on" ' " because she did not want the defendant to think he intimidated her. (*Chandler, supra*, 60 Cal.4th at p. 512.)

The defendant in *Chandler* was charged with one count of stalking Lopez (§ 646.9, subd. (a)), and two counts of making criminal threats based on his threats to Lopez and Alva. In each of the criminal threats counts he was convicted of the lesser included offense of attempted criminal threat. (*Chandler, supra*, 60 Cal.4th at p. 513.) In

addressing the defendant's contention that the court's instructions did not convey to the jury that they had to find the intended threats sufficient to cause a reasonable fear under the circumstances, the Supreme Court stated:

> "[W]hether or not the instructions adequately conveyed this element of the offense, reversal is not warranted because any error was harmless beyond a reasonable doubt. [¶] Upon reviewing the record, we conclude that no reasonable juror could have failed to find defendant's threats sufficient under the circumstances to cause a reasonable person to be in sustained fear. Neither the prosecution nor the defense ever suggested that defendant could be convicted of attempted criminal threat based solely on his subjective intent to threaten. Nor does the evidence suggest that the jury convicted defendant on that basis, since defendant expressly threatened to kill both victims. Moreover, the defense theory at trial did not contest the reasonableness of the victims' fear. Instead, defendant argued that there was reasonable doubt as to whether he made any of the alleged threats and that the threats, if made, did not cause actual or sustained fear." (*Chandler*, *supra*, 60 Cal.4th at p. 525.)

In distinguishing *Jackson*, the *Chandler* court stated:

> "There the defendant stood outside the victims' house while the victims were inside, and one victim testified 'she believed that defendant had mentioned both "blowing our heads off" and "chopping our heads off." ' [Citation.] The Court of Appeal, in reversing the conviction, reasoned that 'the jury might have concluded, since [the victims] were safely inside the house with a telephone to call the police while defendant sat out front, or since defendant's threats were so outlandish, that defendant's statements could not reasonably have caused the victims to suffer sustained fear.' [Citation.] Here, by contrast, Lopez and Alva testified that defendant, a neighbor, made explicit threats that he was going to kill each of them, and defendant made the threats while face-to-face with the victims (and, in Alva's case, while swinging a golf club) on the street where the victims lived. [¶] In sum, defendant's threats were sufficient under the circumstances to cause a reasonable person to be in sustained fear—indeed, defendant did not argue otherwise at trial—and no reasonable juror could have concluded otherwise." (*Chandler*, *supra*, 60 Cal.4th at p. 526.)

The instant case is more like *Chandler* than *Jackson*. Like the defendant in *Chandler*, Delgado explicitly and unambiguously threated to kill Aguirre. He also

threatened Aguirre while brandishing a screwdriver and while standing inches away from him through a partially opened door. As in *Chandler*, defense counsel did not argue that Delgado's threats were not sufficient under the circumstances to cause a reasonable person to be in sustained fear. Instead, like the defense counsel in *Chandler*, he in effect argued there was reasonable doubt as to whether Delgado made any of the alleged threats by arguing that Aguirre was not credible. Thus, in accord with *Chandler*, we conclude that the trial court's instructional error was harmless beyond a reasonable doubt.[4]

The Motion to Reduce Delgado's Conviction to a Misdemeanor

Background

On April 11, 2017, defense counsel filed a sentencing memorandum in which he asked the court to reduce Delgado's attempted criminal threats conviction to a misdemeanor and grant him probation because the jury's verdict indicated they rejected the seriousness of his offense and because of Delgado's personal circumstances, including his physical handicap[5] and his desire to further his education.

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[4] In his reply brief, Delgado contends *Chandler* is distinguishable because the threats in *Chandler* occurred over a period of days, not minutes. However, the *Chandler* court sustained the conviction involving victim Alva even though that conviction was based on a single threat against her by the defendant. Delgado also cites several circumstances in support of his claim that he was prejudiced by the court's instructional error, including that the relationship between Delgado and Aguirre was not harmonious and that Aguirre had previously testified that Delgado did not scare him. During closing argument, defense counsel also argued that Aguirre was not credible. However, none of these circumstances undermine the salient circumstances discussed above that persuade us that C*handler* controls the result here.

[5] Delgado's probation report indicates that he suffered from Guillain-Barré Syndrome, a rare disorder in which the body's immune system attacks the person's nerves. Delgado also had a significant physical deformity in his left hand and he walked with a limp that was apparently due to injuries he suffered in a car accident.

On April 14, 2017, at Delgado's sentencing hearing, in support of Delgado's request to reduce his conviction to a misdemeanor, defense counsel argued that the jury's verdict indicated they did not believe a majority of the testimony by Aguirre or Patsy and that they must have concluded that Delgado threatened them, but did not scare them. Defense counsel also asked the court to consider that prior to the trial, the People offered to let Delgado plead to a misdemeanor, Delgado did not have any criminal history in the prior 10 years, and he was attending classes to be a HVAC repairman. In response, the People argued against reducing Delgado's conviction to a misdemeanor because his offense involved great violence, a threat to kill, and an attempt by Delgado, who was armed with a weapon, to break into Aguirre's home. The People also argued that Delgado's conviction was serious enough to be a strike and that Patsy " 'freaking out' " during the 911 call indicated "there was fear" during the underlying incident.

In denying Delgado's request to reduce his conviction to a misdemeanor, the court, in pertinent part, stated:

> "I was disturbed by … the testimony here because the nature of it was—suggested to me that things had gotten out of control and the fact that there was allegedly some kind of weapon involved was something that bothered me, and that these people were coming face-to-face at a door and there was … potential for even more harm than actually occurred.
>
> "I appreciate defense's position here, but I'm going to deny a 17(b) here. I think this is a felony case and I'm going to leave it as [a felony] attempted [section] 422 here."

The court then placed Delgado on probation conditioned on Delgado serving 90 days in local custody. However, it continued the hearing in order to allow probation to complete its report.

On May 5, 2017, the court again pronounced sentence and clarified that it imposed a probationary term of three years.

Analysis

Delgado contends the jury did not find Aguirre and Patsy completely credible, they did not believe their testimony regarding the alleged vandalism, and they found only that he attempted to make a criminal threat. Therefore, according to Delgado, the court abused its discretion when it denied his request to reduce his conviction to a misdemeanor because it based its decision on its concern that " 'things had gotten out of control' " and that Delgado's offense involved a weapon, which "were facts and instances that the jury did not accept as true." There is no merit to this contention.

"[S]ection 17, subdivision (b) (hereafter section 17(b)), authorizes the reduction of 'wobbler' offenses—crimes that, in the trial court's discretion, may be sentenced alternately as felonies or misdemeanors—upon imposition of a punishment other than state prison (§ 17(b)(1)) or by declaration as a misdemeanor after a grant of probation (§ 17(b)(3))." (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 974 (*Alvarez*).) Attempted criminal threats is a wobbler offense. (§§ 17, 422, 664.)

"[S]ince all discretionary authority is contextual, those factors that direct similar sentencing decisions are relevant, including 'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.' [Citations.] When appropriate, judges should also consider the general objectives of sentencing such as those set forth in [the] California Rules of Court[.]" (*Alvarez, supra,* 14 Cal.4th at p. 978.)

The decision whether to reduce a wobbler rests solely " 'in the discretion of the court.' " (*Alvarez, supra,* 14 Cal.4th at p. 977.) "On appeal, … 'The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.]

Concomitantly, '[a] decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." ' " (*Alvarez, supra*, at pp. 977-978.)

In denying the request to reduce Delgado's conviction to a misdemeanor, the court relied primarily on the following circumstances of Delgado's offense: it involved a face-to-face confrontation, Delgado used a weapon, and his conduct created the "potential for even more harm than actually occurred." These circumstances are amply supported by the record. Further, Delgado's acquittal on the vandalism and criminal threats charges means only that there was reasonable doubt that he committed these offenses (Cf. *People v. Catlin* (2001) 26 Cal.4th 81, 125) and not that he did not commit them or that the court relied on facts that "the jury did not accept as true." Accordingly, we reject Delgado's contention that the court abused its discretion when it refused to reduce his attempted criminal threats conviction to a misdemeanor.

DISPOSITION

The judgment is affirmed.